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No. 89-928

In the Supreme Court of the United States

OCTOBER TERM, 1989

CEMENTOS GUADALAJARA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in this countervailing duty case involving subsidized cement products imported from Mexico in 1983 and 1984, the Department of Commerce was required to determine that the U.S. cement industry was being injured by the imports, although no applicable international agreement required an injury determination with respect to goods imported from Mexico at that time and a final countervailing duty order was issued before an international agreement required an injury determination with respect to Mexican goods.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 879 F.2d 847. The opinion of the Court of International Trade in *Cementos Guadalajara* v. *United States* (Pet. App. B23-B58) is reported at 686 F. Supp. 335. The opinion of the Court of International Trade in *Cementos Anahuac del Golfo* v. *United States* (*Anahuac I*) (Pet. App. B1-B21) is reported at 687 F. Supp. 1558. The opinion of the Court of International Trade in *Cementos Anahuac del Golfo* v. *United States* (*Anahuac II*) (Pet. App. B60-B108) is reported at 689 F. Supp. 1191.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1989. A petition for rehearing was denied on September 12, 1989 (Pet. App. C2-C3). The petition for a writ of certiorari was filed on December 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After finding that Mexican cement companies had received subsidies, the Department of Commerce issued a final determination in 1983 that countervailing duties should be imposed on cement products imported into this country from Mexico. Commerce did not determine whether U.S. industry had been injured by the imports, since no such determination was required by applicable law. Petitioners, six Mexican companies that manufacture and export cement, challenge the countervailing duties imposed on the cement products that they exported to the United States in 1983 and 1984. They contend that a 1985 bilateral agreement between the United States and Mexico, and Mexico's accession to the General Agreement on Tariffs and Trade (GATT) in 1986—both of which call for a determination whether U.S. industry has been injured by subsidized imports before countervailing duties are imposed—apply retroactively to the cement imported in 1983 and 1984.

1. The GATT is an international agreement to which the United States became a signatory in 1947. Under the GATT and the statutes Congress has enacted governing international trade, the United States imposes countervailing duties on goods like cement products imported from a GATT signatory only after determining that they have been subsidized and that an industry in the United States is injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded by the imports. An injury determination is also required in the case of imports from a "country under the Agreement," which is a country that has signed the Subsidies Code, another international agreement entered into under the auspices of the GATT, or has assumed obligations equivalent to those imposed by the Subsidies Code. See 19 U.S.C. 1671(b). The imposition of countervailing duties from a "country under the Agreement" is governed

by Section 701 of the Trade Agreements Act of 1979, 19 U.S.C. 1671. The imposition of countervailing duties from all other countries is governed by Section 303 of the Tariff Act of 1930, 19 U.S.C. 1303. No injury determination is required with respect to goods imported from other countries.

The procedures for imposing countervailing duties are set forth at 19 U.S.C. 1671a-1671e. In response to a complaint by a domestic manufacturer, Commerce conducts an investigation to determine whether the imported goods are subsidized and, if appropriate, whether the domestic industry has been injured. If Commerce determines that a countervailing duty is warranted, it issues an order to that effect and directs the Customs Service to collect an estimated countervailing duty at the time the goods are imported. See 19 U.S.C. 1671e(a)(1); *Ambassador Division of Florsheim Shoe* v. *United States*, 748 F.2d 1560, 1562-1563 (Fed. Cir. 1984). An importer may challenge a countervailing duty order by filing a complaint in the United States Court of International Trade within 30 days after the order was issued. 19 U.S.C. 1516a(a)(2).

Countervailing duty orders are reviewed periodically under Section 751 of the 1979 Trade Act, 19 U.S.C. 1675, and the amount of the countervailing duty is finally determined as a result of the review. See *Ambassador Division of Florsheim Shoe* v. *United States*, *supra*. Thus, after a review, an adjustment is made if the estimated countervailing duty collected at the time of importation is not the same as the countervailing duty ultimately determined to be due. In addition, the estimated countervailing duty collected at the time goods are imported is revised in light of the review.

2. In March 1983, the U.S. cement industry alleged that manufacturers of Mexican cement had received subsidies warranting the imposition of countervailing duties. After investigating the charge, Commerce determined that the

government of Mexico had subsidized four of the five known producers of cement products exported to the United States. It also concluded that no injury determination was required. Commerce directed the Customs Service to require petitioners to pay, at the time their cement entered the United States, estimated countervailing duties based on the amount of the subsidies paid by the Mexican government in 1982. No interested party sought judicial review of this countervailing duty order, which was issued in September 1983. Pet. App. B62-B64.

Commerce subsequently conducted two periodic reviews pursuant to Section 751. The first review, completed in December 1985, covered the second half of 1983 and determined the amount of the subsidy provided to each of the cement manufacturers during that period. As a result of that review, adjustments were made to reflect the differences between the amount of the subsidies determined to have been received in the second half of 1983 and the amount of the countervailing duties actually collected by the Customs Service at that time. Pet. App. B66-B67.

While the first administrative review was pending, the United States and Mexico signed a bilateral agreement, the *Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties* (Apr. 23, 1985). As a result of the Understanding, Mexico was designated a "country under the Agreement," so that countervailing duties would be imposed only after a finding of injury to U.S. industry. Paragraph 5 of the Understanding specified that an injury test was required where "countervailing duty investigations" were "in progress" at the time the Understanding took effect. Commerce determined that no injury test was required as part of the first administrative review, however, because the investigation

leading to the 1983 countervailing duty order had been completed and a final order had been issued. Commerce noted that it had "confirmed with the U.S. negotiators that their intention was to exclude application of [the] Understanding to pre-existing orders." 50 Fed. Reg. 51,736 (1985) (quoted at Pet. App. B68).

A second administrative review was conducted covering cement products imported in 1984. In August 1986, while that review was in progress, Mexico became a formal contracting party to the GATT. Pet. App. B69. Contrary to petitioners' request, Commerce determined that no injury test was required as part of its second review. It explained that "[s]ince Mexico's accession was effective on August 24, 1986," it did "not affect entries covered by this review, which extends only through December 31, 1984." 51 Fed. Reg. 44,500-44,501 (1986) (quoted at Pet. App. B71-B72).

3. Petitioners challenged the administrative reviews in the Court of International Trade. With respect to the first review, which covered the second half of 1983, Judge Aquilino concluded that Commerce had erred by failing to determine whether the imported products had injured the U.S. cement industry. Pet. App. B1-B22. He concluded that the change in Mexico's status resulting from the 1985 Understanding between the United States and Mexico "altered the status of the merchandise emanating therefrom insofar as imposition of those [countervailing] duties was concerned." *Id.* at B8.

Petitioners brought two separate challenges to the second review, which covered 1984, and both were decided by Judge Carman. Contrary to Judge Aquilino, he concluded that Commerce had properly refused to conduct an injury determination. Pet. App. B23-B59, B60-B109. With respect to the effect of the 1985 Understanding between the United States and Mexico, Judge Carman noted that while the Understanding applied to "investigations" in progress at the

time it was signed, the applicable regulations defined "investigation" as the "time between the publication of a notice of initiation and * * * an Order." *Id.* at B96 (quoting 19 C.F.R. 355.6(b)). He held that "the word 'investigation' is limited to that period of time in a countervailing duty investigation which precedes the issuance of a countervailing duty order," and does not include periodic reviews pursuant to Section 751. Pet. App. B97.

With respect to Mexico's accession to the GATT in 1986, Judge Carman noted that in prior cases Commerce had decided to revise countervailing duty orders in light of entry into the GATT "*only* insofar as they pertained to goods entered *after* the date of the status change, and not retroactively to goods entered *before* the change." Pet. App. B101. He held that "[t]here is no provision in the U.S. domestic countervailing duty law or in the GATT providing for retroactive effect." *Id.* at B102.

The court of appeals affirmed the decision upholding Commerce's decision "on the basis of Judge Carman's opinion." Pet. App. A3. It reversed Judge Aquilino's decision "because it is based upon reasoning and analysis which conflicts with Judge Carman's opinions which we have adopted." *Ibid.*

ARGUMENT

1. Petitioners contend that an injury determination was required in the case of cement products imported from Mexico in 1983 and 1984, even though Mexico was not a "country under the Agreement" until 1985 and did not join the GATT until 1986. They contend that the 1985 Understanding applies because the countervailing duty investigation was still "in progress," in their view—even though a final determination had been issued in 1983—since the periodic reviews had not been completed when the 1985 Agreement was signed. With respect to the GATT, peti-

tioners claim that Section 303(a)(2) of the Tariff Act of 1930 compels the conclusion that an injury test was required because, in their view, the countervailing duties for 1984 were not "imposed" until the periodic review was completed.[1] 19 U.S.C. 1303(a)(2).

Contrary to petitioners' contentions, review of the procedures set out in 19 U.S.C. 1671a through 1671e supports the court of appeals' decision. Under Section 1671b(b)(1), a "preliminary determination" as to whether to impose a countervailing duty must be made within 85 days after a complaint is filed. In this case, the preliminary determination was made on July 1, 1983. Pet. App. B63. A "final determination" must then be made under Section 1671d(a)(1) within 75 days of the preliminary determination. In this case, the final determination was issued on September 21, 1983, and was not appealed. Pet. App. B64. As a result of the preliminary and final determinations, the Customs Service collected estimated countervailing duties at the time cement was imported from Mexico in the second half of 1983 and in 1984. Since the final countervailing duty order was issued before Mexico became a "country under the Agreement" and the goods were imported before Mexico joined the GATT, no injury determination was required by Section 303.

That conclusion is not altered by the fact that periodic reviews pursuant to Section 751 were pending when Mexico and the United States entered into the 1985 Understanding. As Judge Carman explained (Pet. App. B96-B97), the countervailing duty investigation had been completed and

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[1] Section 303(a)(2) states that "duties may be imposed under this section only if there are affirmative determinations [of injury]; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States." 19 U.S.C. 1303(a)(2).

the "final determination["] that countervailing duties should be collected had been made before the Understanding was signed. While the signatories agreed that the Understanding would apply to pending investigations, they intended that to mean investigations where a final determination had not been made under Section 1671d.

Analysis of Section 102 of the Trade Agreements Act of 1979, 19 U.S.C. 1671 note, supports that conclusion. That provision deals with investigations that are pending at the time that a country becomes a "country under the Agreement."[2] Section 102(a)(2) states that "[i]f the Secretary has made a preliminary determination under such section 303 * * *, but not a final determination, * * * he shall terminate the investigation under such section 303 * * * and the matter previously under investigation" shall be subject to Section 701 of the 1979 Trade Act, 19 U.S.C. 1671. Thus, if a final determination has *not* been made under Section 303 when a country becomes a "country under agreement," then the investigation is transformed into a Section 701 investigation, which requires an injury determination. But if a final determination has been made, no injury determination is required. In this case, the final determination in the Section 303 proceeding was made on September 21, 1983 (Pet. App. B64)—that is, before Mexico became a "country

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[2] As reprinted at 19 U.S.C. 1671 note, the provision is entitled "Investigations Pending on Jan. 1, 1980" (the date the 1979 Trade Act became effective), but its actual title is simply "Pending Investigations" (see 93 Stat. 189). It is clear that the provision governs cases where a country attains the status of a "country under the Agreement" after January 1, 1980, since the provision governs investigations pending "on the effective date of the application of * * * [Section 701] to imports from a country," and Section 701 applies when a country becomes a "country under the Agreement."

under the Agreement"—so no injury determination was required.

Nor was an injury determination required as part of the second review because Mexico became a member of the GATT in 1986. As Judge Carman explained (Pet. App. B101-B102), it has always been understood that the GATT's application depends on when particular goods are actually imported. See *V. Mueller & Co.* v. *United States*, 115 F.2d 354, 361 (C.C.P.A. 1940). That interpretation of the effect of accession to the GATT is sensible, as there is no good reason why becoming a contracting party to the GATT in 1986 should affect imports in 1983 and 1984. Periodic review under Section 751 is merely a method of assessing the actual amount of duties previously incurred under a countervailing duty order. Since petitioners imported subsidized cement products into the United States in 1983 and 1984, before Mexico was a member of the GATT, they incurred liability for countervailing duties, which are paid by importers, at that time whether or not the domestic cement industry was injured.

2. Petitioners contend (Pet. 6) that review is warranted because the decision below "will cause lasting confusion here and abroad regarding the United States' tariff policies on goods imported from GATT trading partners." There is no merit to that contention. The Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade (28 U.S.C. 1295(a)(5)), so its decision in this case controls.[3]

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[3] Petitioners contend (Pet. 9-10) that the government's position in this case is contrary to the government's position in *Serampore Industries Pvt., Ltd.* v. *United States Department of Commerce, International Trade Administration*, 675 F. Supp. 1354 (C.I.T. 1987). We see no inconsistency. *Serampore* was a dumping case—that is, the importer was alleged to have sold goods in the United States at less than their fair value—and the dumping statute requires Commerce to

Moreover, the decision below merely restates the established principle that the GATT applies to goods imported after the date on which a country accedes to the Agreement. In addition, the application of that principle has a narrow scope. It only applies where a final countervailing duty order was issued under Section 303 with respect to certain goods before a country joined the GATT, and even then only where a periodic review is in progress with respect to goods imported before the country joined the GATT. Furthermore, since there are very few industrial, market economies not yet subject to the GATT (see Zeller, *Countertrade, the GATT, and the Theory of the Second Best*, 11 Hastings Int'l & Comp. L. Rev. 247, 266 n.137 (1988)) and the countervailing duty law does not apply to countries with nonmarket economies (*Georgetown Steel*

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calculate the "United States price" of the goods at issue in determining whether goods were dumped. In making that calculation, 19 U.S.C. 1677a(d)(1)(D) provides that Commerce must increase the United States price by the amount of any countervailing duty imposed on the merchandise. Commerce does not use the amount of the countervailing duty collected at the time of importation to determine the United States price (which petitioners contend is inconsistent with Commerce's position in this case), since the amount of the countervailing duty that is actually imposed following a periodic review may differ from the amount collected at the time of importation. In *Serampore*, the Court of International Trade upheld that approach, finding no indication "that Congress intended that Commerce adjust [the United States price] upwards for countervailing duty cash deposits, rather than countervailing duties actually imposed or assessed" following a periodic review. 675 F.Supp. at 1359. That reasonable conclusion is not contrary to the conclusion of the court below that the effect of the GATT on the countervailing duty collected on imported goods depends on the date the goods were imported rather than the date the relevant periodic review was concluded. In any event, any inconsistency is a matter for consideration by the Federal Circuit, not this Court.

Corp. v. *United States*, 801 F.2d 1308, 1313-1314 (Fed. Cir. 1986)), the effect of accession to the GATT is not likely to be a recurring issue in the near future.

No question relating to the effect of the 1985 Understanding between the United States and Mexico—the sole basis for Judge Aquilino's decision—warrants review by this Court. Whether Judge Carman and the court below correctly determined that the negotiators intended that agreement to require injury determinations only where a final determination had not yet been issued under Section 1671d is a fact-bound question of no general importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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